No. 12,596

IN THE

United States Court of Appeals

For the Ninth Circuit

CHAN SHING HO, also known as Jack Chan,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The appellant, Chan Shing Ho, also known as Jack Chan, was indicted on November 7, 1949, in the District Court for the Northern District of California, Northern Division, as follows:

Count One—for willfully and knowingly attempting to evade and defeat his personal income and victory taxes in the amount of $2,343.26 for the calendar year 1943, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b);

Count Two—for willfully and knowingly attempting to evade and defeat his personal income taxes and those of his wife in the amount of $4,185.78 for the calendar year 1944, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b);

Count Three—for willfully and knowingly attempting to evade and defeat his personal income taxes in the amount of $776.23 for the calendar year 1945, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section (145(b);

Count Four—for willfully and knowingly attempting to evade and defeat his personal income taxes in the amount of $3,109.90 for the calendar year 1946, in violation of Section 145(b), Internal Revenue Code, 26 U.S.C., Section 145(b). (R-1 pp. 1-4.)

On November 28, 1949, the defendant entered a plea of not guilty to each count of the indictment. Trial was had in the District Court and on April 20, 1950, the jury returned a verdict finding appellant guilty on each count of the indictment. (R-1 p. 6.) On May 8, 1950, the District Court committed appellant to the custody of the Attorney General for a period of one year and one day and sentenced him to pay a fine in the amount of $7,500 on the first count of the indictment and further sentenced him to imprisonment of one year and one day on each of the second, third, and fourth counts of the indictment, the periods of imprisonment imposed on Counts Two, Three, and Four to commence and run concurrently with the period of imprisonment imposed on Count One. (R-1 pp. 10, 11.) The Court further

ordered that the defendant be admitted to bail, pending notice of appeal, in the sum of $10,000, and that he be granted a twenty-four hour stay of execution.

Upon conclusion of the case of the prosecution defendant made a motion for a judgment of acquittal, which was denied by the trial Court. On April 25, 1950, defendant filed a motion for a new trial, which was likewise denied. (R-1 p. 7.)

Notice of appeal was filed on May 10, 1950. (R-1 pp. 12-14.)

STATUTE INVOLVED.

Title 26, Internal Revenue Code: Sec. 145.

Penalties

* * * * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE, PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

Appellant was convicted of willfully and knowingly attempting to evade and defeat a large part of his individual income taxes by filing false and fraudulent returns with the Collector of Internal Revenue for each of the years 1943, 1944, 1945, and 1946. During all of those years, and for many years theretofore, appellant had operated a retail meat market known as the Palace Market at 816 "J" Street, Sacramento, California.

For each of the years 1943 to 1946, inclusive, appellant filed partnership income returns for the Palace Market, reporting the income of the business as partnership income (and, incidentally, understating such income), and he filed individual returns reporting as his individual income only a part of the alleged partnership income. The evidence clearly established, however, that no partnership was in existence during those years. The taxpayer admitted to the investigating agents that the partnership had terminated in 1941; alleged partners testified that they had understood that they were no longer partners after 1941; and strong circumstantial evidence established the non-existence of a partnership. Appellant, however, used the partnership device to evade the taxes owing on his income from the Palace Market.

Both the prosecution and the defense computed the appellant's true income during the years 1943, 1944, 1945, and 1946 on the basis of his increase in

net worth, the principal point of difference being that the defense assumed the existence of a partnership whereas the prosecution did not. Many of the other points of apparent difference between the figures of the prosecution and those of the defense were of no significance in determining income since the figures remained constant throughout the period, causing neither an increase nor a decrease in appellant's net worth. This was demonstrated when one of appellant's expert witnesses, testifying on cross-examination, constructed net worth statements, using appellant's figures for the various assets and liabilities but assuming that there was no partnership. These statements showed an even greater increase in net worth than that claimed by the Government.

Evidence presented in support of the various items of net worth consisted of cancelled checks, stipulations between counsel, and admissions of appellant.

QUESTIONS PRESENTED IN THIS CASE.

(1) When appellant elected to proceed with the presentation of evidence did he thereby waive his motion for a judgment of acquittal made at the close of appellee's evidence?

(2) Is the evidence sufficient to support the verdict?

(3) Should this Court review the action of the trial Court in denying appellant's motion for a new trial?

(4) Did the trial Court err in admitting the testimony of the investigating agents as to the admissions of appellant that no partnership existed during the period 1943-1946?

ARGUMENT.

I.

WHEN APPELLANT ELECTED TO PROCEED WITH THE PRESENTATION OF EVIDENCE HE THEREBY WAIVED HIS MOTION FOR A JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF APPELLEE'S EVIDENCE.

The law on this point is too clear to require extended argument. When a defendant offers evidence in a criminal prosecution he thereby waives his motion for a judgment of acquittal made at the close of the evidence offered by the prosecution, and *that motion need not be considered on appeal. Mosca v. United States,* 174 F. (2d) 448 (C.C.A. 9th), and cases cited therein at p. 451.

II.

THE EVIDENCE IS MORE THAN SUFFICIENT TO SUPPORT THE VERDICT.

A

The evidence is sufficient to support the verdict even assuming the existence of a valid partnership as claimed by appellant.

There are two elements to the offense of attempted tax evasion: (a) The existence of a substantial tax deficiency, and (b) Willfulness. As to the first ele-

ment, while the prosecution's computations of tax liability were premised upon the nonexistence of a partnership during the years 1943, 1944, 1945, and 1946, the evidence also showed that the appellant had a substantial tax deficiency *even assuming the existence of a valid partnership as reported in the returns filed by the appellant.* Specifically, the evidence showed the following to be true:

Year	Actual Net Income of Palace Market	Net Income of Palace Market per Partnership Returns
1943	$22,210.29	$ 9,195.08
1944	17,506.23	3,207.25
1945	14,356.37	5,828.01
1946	30,711.09	5,464.97
Total	$84,783.98	$23,695.31

Since the total income of the business was understated on the partnership returns which the appellant personally prepared and filed, the distributive share which he reported as his individual income was likewise understated. In fact, the accounting evidence presented by appellant himself showed an understatement of income of $3,693.97. (Appellant's Exhibit CC.)

Considering the case on this basis, the filing of false returns would itself support an inference of an affirmative attempt to evade taxes without further evidence of willfulness. In the leading case of *Spies v. United States,* 317 U.S. 492, 499, 63 S.Ct. 364, 368, the Court said:

> * * * By way of illustration, and not by way of limitation, we would think affirmative willful

> attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal * * *

Another type of conduct from which affirmative willful attempt may be inferred is the filing of a return from which income is intentionally omitted. *Gaunt v. United States,* ..... F. (2d) ..... (C.C.A. 1st), decided July 28, 1950 (1950 P-H, par. 72,664); *United States v. Croessant,* 178 F. (2d) 96 (C.C.A. 3rd); *Myres v. United States,* 174 F. (2d) 329 (C.C.A. 8th); *Cave v. United States,* 159 F. (2d) 464 (C.C.A. 8th).

It is thus clear that even assuming the existence of a valid partnership the evidence supported the verdict.

B

The evidence clearly shows that no partnership existed during the years 1943, 1944, 1945, and 1946.

In determining whether the evidence is sufficient to support the verdict and sustain the judgment of conviction this Court should consider the evidence most favorably to the prosecution, indulging all reasonable presumptions in support of the trial Court's rulings and drawing all inferences permissible from the record. *Pasadena Research Laboratories v.*

United States, 169 F. (2d) 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S.Ct. 83; *Henderson v. United States,* 143 F. (2d) 681 (C.C.A. 9th).

The evidence clearly supported a finding that no partnership was in existence during the years 1943 to 1946, inclusive, but that the defendant nevertheless reported the income of the Palace Market for those years on a partnership basis for the purpose of evading taxes. The appellant's admissions, the testimony of other partners and the circumstantial evidence were consistent on this point.

Notwithstanding the fact that he may have made ambiguous or even conflicting statements as to the existence of a partnership, the defendant clearly admitted to the investigating agents that he had enjoyed exclusive ownership of the business, at least from 1943 on. Special Agent Englund testified that the defendant had told him that the partnership was discontinued in 1941 (R-2 p. 99, line 25 to p. 100, line 3), and that he had said, "* * * Business all mine since 1941," (R-2 p. 145, lines 21-23). Further, there was introduced in evidence as Plaintiff's Exhibit 40 the transcription of a statement made by the defendant under oath on January 19, 1948, in which he said, "* * * 1940 I went back to China and then '41 all partners everybody dropped out of business. Nobody wanted to stay in business. Too many bills, and then I take them all. * * *"

The testimony of the other alleged partners who testified at the trial likewise supports the conclusion

that no partnership existed during the period in question.

Henry Chan, who was called as a witness by appellant, testified that he talked with the taxpayer about the middle of 1939 about withdrawing from the partnership, and that it was thereafter his understanding that he had withdrawn as a partner. (R-3 pp. 799-801.)

George Chan, who was also called by appellant, testified on direct examination that he had signed a written agreement in 1945 (Deft's. Ex. Z) transferring to the taxpayer all of his interest in the partnership in consideration of the sum of $500 (R-3 pp. 808-811). On cross-examination George Chan proved to be a reluctant, almost a belligerent, witness. The prosecution impeached his testimony by introducing in evidence a written transcript of a question-and-answer statement made by the witness during the course of the investigation (Pltf's. Ex. 43) in which he had stated that the partnership was terminated in 1941 and that he was a partner from 1927 to 1941 only.

Harry Young, the third and last alleged partner to testify, was called as a witness on rebuttal by the Government. The defense had previously introduced in evidence the Chinese original and an English translation of a letter supposedly written by him to the taxpayer in 1947 proposing to withdraw from the partnership and requesting the return of his $500 investment. (Deft's. Ex. K.) Mr. Young's command

of spoken English was not too good and it was not always possible to tell whether he understood the question he was asked on the stand. However, he did testify definitely that he thought he was out of the partnership in 1941. (R-3 p. 839, lines 9-22.) He also testified that the letter (Deft's. Ex. K) had been written for him by a friend, that he himself had not signed it, and that he had not even read it after it was written (R-3 p. 840).

Not only do the admissions of appellant and the testimony of the alleged partners refute the claim that a partnership existed during the years 1943, 1944, 1945, and 1946, but strong circumstantial evidence points to the same conclusion. The taxpayer conducted the Palace Market business exactly as if it were wholly owned by him: He managed the store and signed all checks, except when he was in China in 1940 (R-3 p. 586, p. 667, line 23 to p. 668, line 2); although the business was highly profitable during the years under consideration, he distributed no profits to any of his alleged partners (R-2 p. 538, lines 17-19; R-2 p. 539; R-3 p. 597, lines 10-13; R-3 p. 599, lines 1-3; R-3 p. 615, lines 12, 13) and did not even tell the alleged partners that there were profits to be distributed. (R-2 p. 534, lines 9-21; R-3 p. 667, lines 19-22.)

Appellant introduced in evidence as Defendant's Exhibit F the Chinese original and an English translation of a partnership agreement executed on September 8, 1923, and allegedly still in effect during

the period from 1943 to 1946. This agreement contains the following provisions, among others:

> 7. A financial statement of the company should be sent to each partner at the end of each year.
>
> * * * * * * *
>
> 11. Twenty percent of any profits earned in the year should be distributed as bonuses, the remaining eighty percent could be either distributed among the partners or be kept in the company for expansion purpose as seen fit by partnership meeting—procedure followed as of article number 6.

Appellant admitted upon cross-examination, however, that he had not complied with either of these provisions. (R-3 p. 748, line 11 to p. 750, line 3.)

Appellant also introduced in evidence as Defendant's Exhibit H the Chinese original and an English translation of the minutes of a partnership meeting allegedly held on October 20, 1940, and attended by appellant. According to these minutes the following decisions, among others, were made:

> A partnership meeting should be called on the 1st week of the 4th month of every year.
>
> A financial statement should be issued every spring. Chan Tien Kwei seconded.
>
> * * * * * * *
>
> As of today no partners are allowed to borrow money. All merchandise purchased on credit must be paid in full at the end of each month.

Appellant admitted on cross-examination that he had never called a partnership meeting after the

meeting of October 20, 1940 (R-3 p. 753, lines 11-22), and that he had never issued a financial statement as ordered at the meeting (R-3 p. 753, line 23 to p. 754, line 1). He remembered the decision that no further loans were to be made to partners (R-3 p. 754, lines 2-7), yet he explained his increase in net worth by claiming that he had "borrowed" a total of $36,058.80 from the partnership by the end of 1946 (Deft's. Ex. BB; R-3 p. 613, lines 7-11).

No drawing accounts were set up on the books of the business for any of the alleged partners, including appellant (R-3 p. 875, lines 8-20), and appellant did not even keep a record of the amount he claims he borrowed from the partnership (R-3 p. 613, lines 12-13).

To summarize, the evidence shows that during the years 1943, 1944, 1945, and 1946 appellant conducted the business of the Palace Market as the sole owner. He ran the business, signed the checks, distributed no profits to anyone else, acknowledged no duty to distribute profits, and disregarded the requirements of both the original partnership agreement and the meeting held in 1940.

Fully cognizant of his exclusive ownership, appellant prepared and filed partnership income returns for the business and reported only a portion of the net income on his individual returns. The remainder of the income was reported by no one. It is significant that, whereas appellant obtained the assistance of an attorney in the preparation of his individual

returns, he prepared the partnership returns himself and did not even discuss them with the attorney. (R-2 p. 46, lines 4-7.) That his purpose was to evade his taxes through the use of the partnership device is evident.

C

Appellant's income was properly computed on the basis of his increase in net worth.

Appellant also argues that the net worth method of computing income, used by the Government to establish a tax deficiency was improper in that (a) there was not a sufficient showing that the defendant's books were "inadequate" to justify disregarding them, and (b) the balance sheets prepared by the Government were based entirely upon the uncorroborated extrajudicial admissions of the defendant.

As testified by Special Agent Englund (R-2 p. 168) the Government ordinarily uses the net worth method in the computation of income only when the taxpayer's books and records are inadequate. Appellant argues that the prosecution failed to show that his books and records were inadequate. However, he cites no case holding that the use of the net worth method is conditioned upon a showing of the inadequacy of existing books and records, for *there is no reported decision which so holds.* Nor have the courts undertaken to define the term "inadequate" in this connection. However, in the case of *Jelaza v. United States,* 179 F. (2d) 202 (C.C.A. 4th), the use of the net worth method was approved notwith-

standing evidence that the books of the taxpayer were, on their face, apparently as well kept as the average books kept by others in a similar business.

In the *Jelaza* case the defendant was tried and convicted of attempted evasion of income taxes for the years 1943 and 1944. At the trial the Government introduced evidence of his net income for those years based on three alternative methods of computation: the expenditures method, bank deposits plus cash expenditures, and the net worth method. The judgment was affirmed by the Court of Appeals, notwithstanding the fact that the defendant's books and records were apparently regular on their face and an employee of the defendant testified at the trial that, to the best of his knowledge, the sale price of all goods sold by the taxpayer was clearly marked and that all sales were run through the cash register.

The appellant's books and records were kept on the basis of a single-entry system. (R-2 p. 170, lines 1, 2; R-3 p. 979, lines 6, 7.) George Harbinson, a certified public accountant called by the defense as an expert witness, testified that this system has a basic weakness in that there are not two "self-balancing sets of accounts" as in a double-entry system, with the result that errors cannot be readily checked. (R-3 p. 979, lines 18-21.) The use of such a system is in itself an inadequacy which might well justify the use by the Government of the net worth method. See *Index Notion Co.,* 3 B.T.A. 90, 92, where the Court said:

> Where books of account are maintained by the single-entry method of bookkeeping, the determination of net income is made by comparison of the net worth at the close of the year with the net worth at the beginning of the year.

However, there were other and more significant inadequacies in the particular method of bookkeeping used by the appellant. Mr. Harbinson testified, as an expert for the defense, that the method had two definite weaknesses; that the first of these consisted of the method of handling charge sales, which were not rung up on the cash register (R-3 p. 979, line 25 to p. 981, line 13); and that the second consisted of the method of keeping the books with respect to the handling of cash (R-3 p. 981, line 16 to p. 982, line 9). It should also be noted that the cash registers used by the appellant did not have tapes (R-3 p. 678, lines 7-9); the appellant admitted on the stand that he took cash from the till for his personal living expenses (R-3 p. 655, lines 5-8); and sales tags for charge sales (which were not rung up on the cash register) were destroyed after payment was made (R-3 p. 681, lines 13-18), so that no basic record remained as to charge transactions.

As explained in appellant's brief (pp. 43-48) the appellant's records were kept partly in English and partly in Chinese. Considerable emphasis is placed by the appellant on the failure of the Government to obtain a complete translation of the Chinese records before resorting to computations based on increase in net worth. However, the evidence shows that ap-

pellant had prepared English summaries of his Chinese records for the years 1944, 1945, and 1946 (referred to as the "butcher paper summaries") which he had furnished to Special Agent Englund and which Mr. Englund had found to agree with the partnership returns filed by the taxpayer for those years. (R-2 p. 167, lines 8-11; R-2 p. 189, line 13 to p. 190, line 6.) The defendant testified that he had in fact prepared the partnership returns for the years 1944, 1945, and 1946 from these summaries. (R-2 p. 464, lines 3-14; R-2 p. 467, lines 12-17; R-2 p. 469, line 23 to p. 470, line 15.) The summaries were introduced in evidence as Defendant's Exhibits T, U and V.

Finding that these summaries, which were prepared by the taxpayer himself, were in agreement with the partnership returns for the years 1944, 1945, and 1946, the special agent was entirely justified in concluding that the Chinese records themselves agreed with the returns, and in inferring that the same would be true for the year 1943, as to which the taxpayer had made no summary. Significantly, however, neither the partnership returns nor the individual returns filed by appellant reported sufficient income to account for the material wealth accumulated by him during these years, and this demonstrates another sense in which the taxpayer's books and records may be considered inadequate.

There is no contention that appellant's increase in net worth reflected any gifts, bequests, inheritances, or other non-income items with the exception of the

repayment of certain loans in the total amount of $3,600 in 1946. (Deft's. Ex. BB.) With the exception of a small amount of rental income in 1945 and 1946, all of the taxpayer's income was derived from the Palace Market and his increase in net worth is a reflection of such income. Yet it is impossible to account for the net worth increase on the basis of his books and records. It is obvious that the books and records do not adequately record appellant's income.

Finally, it should be noted that although the James Soo Hoo, accountant, and George Harbinson, certified public accountant, who testified as expert witnesses for the defense, had been employed to make an audit of his books and records in preparation for the trial (R-3 p. 756, line 20 to p. 757, line 6; R-3 p. 974, line 4 to p. 976, line 5), *the results of this audit were never presented to the jury by the defendant. The accounting evidence presented by the defense, like that presented by the Government, was based on the use of the net worth method of computing income.* See Defendant's Exhibits AA, BB, and CC. Thus, while the appellant complains about the use of the net worth method by the Government, he used precisely the same method in presenting his case.

The differences between appellant's computations and those of the prosecution are not significant when the partnership question is eliminated. This was demonstrated by the Government during the cross-examination of James Soo Hoo, an accountant who testified as an expert witness for the defense. While

he was on the stand Mr. Soo Hoo was asked to construct revised balance sheets showing the net worth of the taxpayer as of December 31, 1942, and December 31, 1946, the beginning and end of the total period under consideration. He was instructed to use, generally, the values assigned by the defense in its balance sheets (Deft's. Exs. AA, BB, and CC) to the various assets and liabilities, but to assume that there was no partnership in existence during the period. (R-3 p. 942, line 14 to p. 943, line 4.) The amounts shown on the balance sheets introduced in evidence by the defense were used, except as certain changes were indicated by the evidence presented at the trial.

The balance sheets which Mr. Soo Hoo thus constructed on the witness stand (Pltf's. Ex. 45) showed that at the beginning of the year 1943 the taxpayer had a negative net worth of $17,599.29 (that is, his liabilities exceeded his assets by that amount) and at the end of 1946 he had a positive net worth of $68,675.97, indicating an increase in net worth over the four-year period of $86,275.26. The Government's figures set forth in Plaintiff's Exhibit 39, by way of comparison, showed an increase in net worth over the same period amounting to $83,875.89.

Appellant attacks the values assigned by the prosecution to certain items of the taxpayer's net worth and claims that certain other items were erroneously omitted. (Br. p. 10.) Without discussing these items in detail, it is apparent that the figures used by the prosecution were, in toto, more favorable to the tax-

payer than those presented by the defense, as demonstrated by the defendant's own expert, Mr. Soo Hoo.

Whether or not a particular Government translator was able to translate the taxpayer's Chinese books and records is of no great moment in the Government's theory of this case. These books and records were undoubtedly susceptible of translation, if not by Victor Chin, then by someone else. As shown above, they were inadequate in many respects without regard to the language in which they were written, and the use of the net worth method of computing income in this case need not be justified on the basis of the Government's inability to translate the records.

It is true that there is but one Chinese written language, and it appears likely that Special Agent Englund misunderstood the statement of Victor Chin on that point. However, it is also true that the various spoken dialects of the Chinese language are reflected in terminologies and usages peculiar to particular regions, with the result that a translator from one part of China may not be able to understand the meaning of all that is written by a person from another region. It is entirely possible that certain designations used by the taxpayer in his books and records were unintelligible to Victor Chin.

Incidentally, appellant is in error in his repeated statements that Victor Chin was present in the court room throughout the trial. (Br. pp. 52, 114.) Victor Chin was not in the court room at any time during the trial. David Ip, a deputy collector of Chinese

extraction who had had no previous connection with the case, was brought up to Sacramento from the Collector's office in San Francisco after the first day of trial and he thereafter assisted the Government as a translator.

Appellant claims that the balance sheets prepared by the prosecution and introduced into evidence as Plaintiffs' Exhibit 39 relied entirely upon extrajudicial admissions of the accused. The record clearly shows that this is not so. The balances in each of the taxpayer's three bank accounts at the beginning and end of each year were established by the bank ledger sheets which were introduced in evidence as Plaintiff's Exhibits 26, 27, and 28, as well as by a stipulation entered into by counsel. (Pltf's. Ex. 17.) A business account receivable from Su Quock in the amount of $500 was evidenced by a photostatic copy of the check by which the loan was made. (Pltf's. Exhibit 25.) Counsel stipulated (Pltf's. Ex. 11) that the taxpayer's purchase of a dwelling at 4255 Herbert Street, Sacramento, was recorded in the office of the registrar of deeds for Sacramento County, California, and that the purchase was evidenced by two cancelled checks issued by the taxpayer to Artz & Cook, Inc., as follows:—Check drawn on the account of Jack Chan with the Merchants National Bank, dated November 10, 1943, in the amount of $200, and check drawn on the Palace Market account with the Capital National Bank, dated November 17, 1943, in the amount of $6,567.42.

The cost of home furnishings purchased by the taxpayer during the years under consideration was established by two cancelled checks in the respective amounts of $205 and $275.83, which were introduced in evidence as Plaintiff's Exhibit 29. Counsel stipulated (Pltf's. Ex. 15) to the cost of certain real property located at 816 "J" Street, Sacramento, and the cost was partially corroborated by three cancelled checks totaling $15,000 (Pltf's. Ex. 14). The cost of the lot on Herbert Street was stipulated to by counsel (Pltf's. Ex. 16.) Counsel stipulated that the taxpayer paid $1,100 for a Packard automobile in 1943 (Pltf's. Ex. 19), and the cancelled check issued in payment thereof was introduced in evidence (*Ibid.*). The cost of motion picture equipment acquired in 1946 was likewise supported by both a stipulation and a cancelled check which was introduced in evidence. (Pltf's. Ex. 20.)

Evidence of the taxpayer's liabilities was likewise presented at the trial. The taxpayer's cancelled checks issued in repayment of his accounts payable to Hip Hing Co., J. B. Johnson, Chin Wing, and Quok Bros. were introduced in evidence. (Pltf's. Exs. 30, 31, 32, and 33.) A group of checks by which liabilities to former partners were discharged were introduced in evidence as Plaintiff's Exhibit 34.

Expenditures made by the taxpayer for insurance premiums, income taxes, purchase of foreign exchange, and medical expenses were likewise evidenced by cancelled checks which were introduced in evi-

dence. (Pltf's. Exs. 35, 36, 37, and 38.) An interest payment made in 1944 was accepted as shown on the taxpayer's income tax return, which was in evidence as Plaintiff's Exhibit 2.

In view of this volume of documentary evidence it can hardly be maintained that there was no corroboration for the defendant's extrajudicial admissions as to the items of assets and liabilities comprising his net worth.

III.

THE ACTION OF THE TRIAL COURT IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL IS SUBJECT TO REVIEW IN THIS COURT ONLY FOR CLEAR ABUSE OF DISCRETION, AND NO SUCH ABUSE OF DISCRETION IS SHOWN.

Rule 33 of the Rules of Criminal Procedure for the District Courts of the United States provides, in part, "The court may grant a new trial to a defendant if required in the interest of justice." It is well established, however, that the action of the district court in granting or refusing to grant a new trial is a matter of discretion and cannot be reviewed in this Court except for clear abuse of discretion. *Brolaski v. United States,* 279 Fed. 1 (C.C.A. 9th), certiorari denied, 258 U.S. 625, 42 S.Ct. 381; *United States v. Holt,* 108 F. (2d) 365 (C.C.A. 7th), certiorari denied, 309 U.S. 672, 60 S.Ct. 616, rehearing denied, 309 U.S. 698, 60 S.Ct. 806. It is clear that the trial

Court did not abuse its discretion in this case in denying appellant's motion for a new trial, and there is no basis for review of its action by this Court.

IV.

THE TRIAL COURT DID NOT ERR IN ADMITTING THE TESTIMONY OF THE INVESTIGATING AGENTS AS TO ADMISSIONS OF APPELLANT THAT NO PARTNERSHIP EXISTED DURING THE PERIOD 1943-1946.

Appellant claims that the investigating agents were improperly permitted to give to oral summarizations or characterizations of admissions made by appellant as to the existence of a partnership rather than giving the actual statements that were made or even the gist or substance of these statements. (Br. p. 84 *et seq.*) It is submitted that the agents were testifying to the substance of statements made by appellant to the best of their recollection and that it was not error to admit such testimony in evidence. Their testimony is corroborated by the taxpayer's recorded statements under oath (Pltf's. Ex. 40) which have been previously discussed.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment and sentence of the Court should be affirmed.

Dated, San Francisco, California,
November 6, 1950.

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